

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the matter of:)	
)	
Request for Review of Decisions)	Docket No. 02-6
of the Universal Service Administrator)	
)	

Ref.:	Applicant Name:	Hempstead Union Free School District
	Entity Number:	123829
	Funding Year:	FY 2005
	471 Application Number:	489185
	Funding Request Number:	1356166

Background:

Funding for Hempstead's referenced FRN was reduced by the SLD for the stated reason that: "The dollars requested were reduced to remove the costs associated (sic) with ineligible services i.e., Blackberry Email and Web and Direct Protect Insurance." A subsequent appeal to USAC of the reduction for the Blackberry e-mail data services¹ was denied on October 18, 2005. In its denial, USAC stated: "Cellular voice service which includes Internet access, email and text messaging must be cost allocated because the SLD has determined that it does not have clear authority to fund Internet Access outside of school or library grounds. Therefore, these Internet based services for hand-held devices have been deemed ineligible."

This appeal seeks clarification and/or answers to the following questions:

1. Is it the intent of the Commission's eligibility rules not to fund Internet Access from handheld devices outside of school or library grounds?
2. In the event that Internet Access from handheld devices outside of school or library grounds is deemed ineligible, is it also the intent of the Commission's eligibility rules not to fund IP-based e-mail and text messaging services?
3. In the event that IP-based e-mail and text messaging services outside of school or library grounds are deemed ineligible, is this meant as a clarification of previous rules or is it meant to apply only to FY 2006 and beyond?

¹ The reduction for Direct Protect Insurance was correct and was not appealed.

Internet Access and IP-based e-mail and text messaging service outside of school or library grounds:

In its Second Report and Order (FCC 03-101), the Commission clarified the scope of the requirement that services be used for educational purposes. It concluded "...that in certain limited instances, the use of telecommunications services offsite would also be integral, immediate, and proximate to the education of students or the provision of library services to library patrons, and thus, would be consider to be an educational purposes." Additionally, in a footnote, the Commission provided several examples of offsite activities that would be consistent with this clarification.

The draft Eligible Services List ("ESL") for FY 2006 which USAC submitted to the Commission for review and approval included two provisions dealing with the eligibility of Wireless Internet Access devices. Under one broad provision, which was not adopted by the Commission, USAC proposed a requirement to separate funding requests for Telecommunications and Internet Access services. A more specific provision, which was revised by the Commission, states: "A wireless Internet Access service designed for portable devices may be funded, provided that the applicant has in place an auditable system to allocate between eligible and ineligible uses."²

One key issue in this appeal is the nature of the service provided by small, handheld, wireless devices (such as a Blackberry). While such devices can provide access to Internet Web sites, their small screen sizes clearly limit the usefulness of this capability. More generally, the primary use of such devices is voice telephone usage and textual data messaging.

By declining to adopt USAC's proposed separation requirement, Blackberry users have retained the ability to apply for the full range of supported services within the Telecommunications category, regardless of whether any individual service would be considered Telecommunications and Internet Access.

This begs the question of whether wireless e-mail and text messaging services should be considered Telecommunications or Internet Access. By reducing Hempstead's funding request for Blackberry service, USAC apparently believes (in the absence of any "clear authority" to the contrary) that:

1. E-mail and text messaging are Internet Access services which do not fall under the offsite Telecommunications provisions of the expanded definition of Educational Purpose; and
2. The "eligible and ineligible uses" referred to in the final ESL for FY 2006 refer to the use of such handheld devices from eligible and ineligible locations (rather than to eligible or ineligible users).

² Although not specifically an issue in this appeal, we should note that the requirement for an auditable system to allocate between eligible and ineligible uses is problematic. The use of an auditable mechanism for determining eligibility first appeared in the ESL for FY 2001 in connection with Phone Calling Cards. This was a reasonable requirement which could be easily satisfied based on billing account call records. The concept was extended to Conferencing Services the next year in the ESL for FY 2002 — again as a requirement which could be easily satisfied through usage logs or billing records. By contrast, even the SLD has admitted that they have not determined what sort of auditable system might be acceptable for tracking wireless Internet device usage by location. Thus, if the wireless auditable requirement is to have any practical interpretation, the eligibility of "uses" must refer to the eligibility of the users (which can be monitored), rather than to the eligibility of locations (which cannot).

With regard to the first point, we ask the Commission to consider and to make clear that wireless e-mail and text messaging are Telecommunications services. While such services may be implemented using IP-based Internet technologies, we submit that the services themselves are functionally equivalent to one- and two-way text paging services which are indeed Telecommunications services. Under the Commission's longstanding policy of technical neutrality, Blackberry-type messaging should also be treated as Telecommunications services. To the extent that small, handheld, wireless devices do provide direct — albeit highly limited — Internet Access, we urge the Commission to consider such use ancillary.

With regard to the second point, we ask the Commission to clarify whether the ESL language on “eligible and ineligible uses” is meant to refer to eligible onsite vs. ineligible offsite usage.

Effective date of eligibility determination:

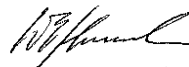
Should the Commission decide that USAC's decision to treat Blackberry-type e-mail and text messaging from offsite locations as ineligible is correct, we ask the Commission to clarify that this determination will apply only to funding in FY 2006 and beyond, and should not be applied retroactively. In support of this position, we note:

1. There is not even a hint of such an adverse eligibility decision in the ESL for FY 2005; and
2. Retroactive application of this determination would fly in the face of the Commission's principle set forth in its Third Report and Order (FCC 03-323) that stated: “The yearly updated list will interpret what may be funded under current rules, and will represent a safe harbor that all applicants can rely on in preparing their applications for the current year.”

Summary:

By this appeal, we ask the Commission to review and reverse the Administrator's decision on the referenced Hempstead funding request. More broadly, we ask the Commission to clarify for USAC and for all applicants the eligibility and/or service classification of Blackberry-type e-mail and text messaging services.

Respectfully submitted on behalf
of Hempstead UFSD,



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